

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE T. S. ELLIS  
UNITED STATES DISTRICT JUDGE

**APPEARANCES:**

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1  
2 (Appearance page  
continued)

3 COURT Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR

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5 Proceedings reported by stenotype shorthand.  
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## PROCEDINGS

(3:06 P.M.)

THE COURT: You may call the next matter, please.

4 THE DEPUTY CLERK: The Court calls civil matter  
5 Charlotte Charles, et al., versus Anne Sacoolas, et al. Case  
6 Number 20-CV-1052.

7                   May I have appearances please, first for the  
8 plaintiff.

9 MR. TOLL: Good afternoon, Your Honor. For the  
10 plaintiff, Steven Toll. I would say it is nice to see you  
11 again, but it is nice to hear your voice again. With me is  
12 my partner who will argue, Agnieszka Fryszman.

13 MS. FRYSZMAN: Good afternoon, Your Honor.

14 THE COURT: How do I pronounce your name,  
15 Ms. Fryszman?

16 MS. FRYSZMAN: Agnieszka Fryszman.

17 THE COURT: So "Fryszman" is correct; is that right?

18 MS. FRYSZMAN: Yes, sir.

19 THE COURT: Thank you.

20 Who is on the line on behalf of the defendant?

21 MR. McGAVIN: Good afternoon, Your Honor. My name is  
22 John McGavin, and I represent both defendants.

23 THE COURT: All right. And you will be arguing on  
24 behalf of the defendants?

25 MR. McGAVIN: Yes, I will, Your Honor.

1 THE COURT: All right. Now, the matter is before the  
2 Court on a motion for dismissal pursuant to the doctrine of  
3 *forum non conveniens* and also pursuant to a number of other  
4 claims. There's an 11-count complaint, some counts of which  
5 the plaintiff has indicated an intention to withdraw -- I  
6 think that's four of them, maybe five -- and there's a motion  
7 to dismiss those.

12 So let me begin by giving the defendant -- that's  
13 Mr. McGavin -- an opportunity. Of course, I have read your  
14 briefs. In fact, I'm going to ask you a number of questions,  
15 to begin with, Ms. Fryszman and Mr. McGavin. Let me start  
16 just generally by asking you some questions that I'm unclear  
17 about regarding the facts. All right. And let me address  
18 these to Mr. McGavin.

19 Mr. McGavin, as I understand it, this case arises  
20 from a tragic, unfortunate accident that occurred in the  
21 United Kingdom, and it was a collision between the defendant,  
22 Ms. Sacoolas' car, and the motorcycle of the decedent, a  
23 head-on collision.

24 Let me ask you, Mr. McGavin, as I understand it, the  
25 defendant, Ms. Sacoolas, did not remain at the scene but left

1 the scene and did not call an ambulance but later someone  
2 did. The decedent, as I understand it, did not die instantly  
3 but died later on.

5 MR. McGAVIN: Thank you, Your Honor. This is John  
6 McGavin, as we're asked to identify ourselves.

7 Your Honor, the facts as alleged in the complaint are  
8 not completely accurate about what occurred after the  
9 accident. Ms. Sacoolas had her children in the vehicle, and  
10 upon the occurrence of the accident, she checked on her  
11 children and went to check on Mr. Dunn. And about that time  
12 another motorist arrived and called 9-1-1. She did not flee  
13 the scene of the accident; she stayed at the accident scene.  
14 So that allegation is disputed and --

17 MR. McGAVIN: She stayed until the rescue squad was  
18 there, but I could not tell you precisely how long, but the  
19 suggestion that she fled is just not true.

20 THE COURT: Did she stay until the police came?

21 MR. McGAVIN: Yes, Your Honor. She spoke to the  
22 police. She told them the same thing that she has said, and  
23 has accepted responsibility for the accident, and there is no  
24 dispute on liability. This is a quantum-only case. So she  
25 spoke to the police. She admitted that she was on the wrong

1 side of the road and, in these proceedings, maintains that  
2 same position.

3 THE COURT: Why did she flee the United Kingdom?

4 MR. McGAVIN: Well, the allegations that she fled the  
5 United Kingdom are a bit overstated, in our view, Your Honor.  
6 She came to the United States and did not participate in the  
7 criminal prosecution, and that is what has caused a great  
8 deal of local interest in the UK and has gotten a great deal  
9 of publicity and a great deal of interest. So her reasons --

10 THE COURT: Why did she flee the United Kingdom?

17 MR. McGAVIN: It was within a month or so after the  
18 accident, Your Honor.

19 THE COURT: Can you be more precise? Was it within  
20 days?

21 MR. McGAVIN: Your Honor, my understanding is it was  
22 approximately 30 days, but I don't know precisely the  
23 timeline of when she did leave.

24 THE COURT: I assume you talked to your client, so  
25 you're confident it is about a month?

1 MR. McGAVIN: I am, Your Honor. That's my  
2 understanding.

5 MR. McGAVIN: Your Honor, I know that she was  
6 consulting with counsel, and what those consultations were  
7 and ultimately the decision to return to the United States I  
8 do not know, and I'm not sure that -- I do not -- I cannot  
9 answer that question in complete candor to the Court, Your  
10 Honor.

11                   What you're saying is you know the answer but you  
12                   can't disclose it?

13 MR. McGAVIN: In part, Your Honor, that would be  
14 true.

15 THE COURT: Well, it's puzzling.

16 Let me ask this question of Ms. Fryszman: Do you  
17 know any facts of why she left the United Kingdom and when  
18 she left?

19 MS. FRYSZMAN: I do not, Your Honor. I don't know  
20 why she left. I do know that she told the local police that  
21 she would stay and cooperate with the investigation, but she  
22 did not and she, instead, returned to the United States.

23 THE COURT: Mr. McGavin, is Mrs. Sacoolas employed by  
24 any department or agency of the United States?

25 MR. McGAVIN: She has been, yes, Your Honor.

1                   THE COURT: I understand she may have been in the  
2 past. At the time of this accident, was she employed by any  
3 department or agency of the United States?

4                   MR. McGAVIN: I believe that she was, Your Honor.

5                   THE COURT: All right. Do you know what department  
6 or agency of the United States?

7                   MR. McGAVIN: No, Your Honor. That has not been  
8 revealed to me.

9                   THE COURT: Do you know what department or agency of  
10 the United States her husband was employed by?

11                  MR. McGAVIN: It is a matter that is -- the short  
12 answer, Your Honor, I do not know the agency or the entity by  
13 whom he is employed. That has not been provided, and I do  
14 think there are some issues there of security. That's my  
15 understanding.

16                  THE COURT: Are you saying that Mr. and Mrs. Sacoolas  
17 were employed by an intelligence agency of the United States,  
18 and that's why she left?

19                  MR. McGAVIN: I think that was a significant factor,  
20 certainly, especially for Mr. Sacoolas. The incident  
21 occurred after they were at an Air Force base where  
22 Mr. Sacoolas was working, and Ms. Sacoolas was -- had the  
23 children there at the event and was driving the children  
24 home.

25                  THE COURT: And what did Ms. Sacoolas do for the

1 department or agency of the United States for which she was  
2 then employed?

3 MR. McGAVIN: Your Honor, I do not have details of  
4 what her specific roles or duties were. I do not know that.

7 MR. McGAVIN: That is what I have been led to  
8 believe, Your Honor, but I do not want to overstate that.

9 And if it's something that the Court would need in his  
10 determination, I would press my client for more details.

14 MR. McGAVIN: That is my rough understanding, Your  
15 Honor, yes.

19 Now, your client, Mr. McGavin, she declines to return  
20 to the United Kingdom; is that right?

21 MR. McGAVIN: That's correct, Your Honor.

22 THE COURT: Why does she decline to return to the  
23 United Kingdom?

24 MR. McGAVIN: Her fear is that, with the tremendous  
25 media attention, that she will not receive -- or she's

1 concerned that she will not receive fair treatment both with  
2 the press and the local community. So she is fearful upon  
3 the return, and concerned, and she's certainly apologetic and  
4 accepts full responsibility for causing this accident and has  
5 never denied it.

6 THE COURT: Yes, but accepting full responsibility  
7 doesn't mean you run away; it means that you stay there and  
8 face it. So I think you shouldn't overplay the "full  
9 responsibility" card.

10 Now, let me ask you this: If she won't return to the  
11 United Kingdom, why in the world does that make the United  
12 Kingdom the right place to litigate this case under the  
13 *forum non conveniens* doctrine?

14 MR. McGAVIN: There are a number of reasons, Your  
15 Honor, and they go in part to what the Court might ultimately  
16 do with the nature of the plaintiffs' claims. But in the  
17 claims that we anticipate will survive, there is a claim  
18 under the LRA for the pain and suffering of the deceased  
19 before his death. And there will be medical providers, there  
20 will be EMTs, there will be the motorist who came up on the  
21 scene shortly after the accident, there will be healthcare  
22 professionals who would be witnesses who will be available to  
23 receive process in the UK and provide that evidence. In  
24 addition, Mr. Dunn, the father, has a claim in his own right  
25 for having come up on the scene and found his son in distress

1 and seeing him suffer, and he makes a claim for emotional  
2 distress. That's not a bereavement claim or a solace claim,  
3 which is not permitted under the law of the UK, but it is a  
4 claim under which severe medical -- medical or emotional --  
5 mental or emotional distress can be tested by healthcare  
6 professionals, and that would be in the UK.

7 In addition, Your Honor, under the Fatal Accident  
8 Act, the plaintiff is claiming pecuniary loss, loss of  
9 services. And as the deceased was 19 years old, emancipated,  
10 he does not leave a surviving spouse or children, then for  
11 the mother and father and surviving brother, the question  
12 will become what pecuniary services he was providing and  
13 whether that is lost income or services in kind. Those will  
14 have to be fully tested as the quantum of any damages that  
15 the Court will award is evaluated. So those things are  
16 uniquely available, those witnesses and that evidence, the  
17 school records or employment records or evidence of payment,  
18 those things are uniquely within the UK, and not in the  
19 United States, where obviously Mr. Dunn lived and worked and  
20 went about his school activities or other things that he was  
21 engaged in in the UK. So that evidence is uniquely there in  
22 the UK.

23 Ms. Sacoolas doesn't add or provide much to setting  
24 that quantum of damages as to what is the emotional distress  
25 suffered by Mr. Dunn after his injury and his suffering until

1       he died, Mr. Tim Dunn's claim for his emotional distress, and  
2       then evaluation of those pecuniary damages. So there are a  
3       number of reasons why that evidence will be far easier to  
4       develop, far easier to subpoena, far easier to present in the  
5       UK.

6               As to public interest, there is enormous public  
7       interest in this case in the UK, as evidenced by the  
8       tremendous amount of media attention and the interest that  
9       has gone all the way up to the Prime Minister, who has  
10       expressed some interest in this case. So, obviously, there  
11       is a tremendous interest there.

12               Plus, the law in the UK on this is very -- on a  
13       wrongful death action of this kind -- is very different than  
14       what we have in the United States. It is very nuanced. And  
15       we have expert -- competing expert reports that help explain  
16       it to us. But it is a very different application of the law.  
17       Certainly, Your Honor can interpret it, but it is nuanced and  
18       it is different, and it would be likely interpreted perhaps  
19       differently than here. That's good or bad different law, it  
20       doesn't preclude the case being dismissed on this motion, but  
21       it certainly is an important factor in the Court exercising  
22       its discretion.

23               So for these reasons --

24               THE COURT: What -- go ahead. "For these reasons,"  
25       go ahead, sir.

1 MR. McGAVIN: Thank you, Your Honor.

2 I was going to say, for these reasons, we believe  
3 that the motion should be granted.

6 MS. FRYSZMAN: Your Honor, no case has been cited to  
7 you -- and I know of no case -- where any court has dismissed  
8 on *forum non conveniens* grounds in favor of the jurisdiction  
9 where the defendant has stated that they will not appear.

10 There is no precedent that I know of for such a dismissal.

11 The plaintiffs in this case filed here in the Eastern  
12 District of Virginia because this was the only place where  
13 they could obtain personal jurisdiction over the defendant.

14 It is the defendant's --

17 MS. FRYSZMAN: Yes.

18 THE COURT: Go ahead.

19 MS. FRYSZMAN: There is Fourth Circuit precedent that  
20 says that when a plaintiff, even a foreign plaintiff, files  
21 in the defendant's home that that choice is entitled to  
22 deference. To prevail, the defendants must show that this  
23 forum is vexatious and oppressive and that the public and  
24 private interests strongly favor transfer, and this they  
25 cannot do.

1                   And I will take the witness arguments first. It is  
2 our view that Anne Sacoolas is a necessary and key witness.  
3 She is the only witness to Harry's pain and suffering as he  
4 lay on the ground after the accident during the time period  
5 from when the accident occurred to the time period when the  
6 first responders arrived, which in our understanding that was  
7 quite a long period. So she is going to be a key witness as  
8 to damages. And the Fourth Circuit, in *DiFederico v.*  
9 *Marriott*, held that that was a reason to deny  
10 *forum non conveniens* transfer, in that case where a key  
11 damages witness couldn't go to the foreign court. So on that  
12 basis alone, I think transfer is inappropriate. She would be  
13 a key witness on damages, and she is also a key witness on  
14 the merits.

15                   One of the negligence claims is that she did not call  
16 for help and did not call the police when she had a duty to  
17 do so after having caused the accident. Although the  
18 defendants say that they have admitted full responsibility  
19 that she was driving on the wrong side of the road, they  
20 haven't spoken to that part of the negligence claim. And  
21 there is also the vicarious liability claim, and both Mr. And  
22 Mrs. Sacoolas will be witnesses in that claim. So it is our  
23 view that they will be needed at trial, and they refused to  
24 appear, and the defendants have not met their burden showing  
25 that a trial could go forward at all in the United Kingdom

1                   when the defendants refuse to appear and refuse to testify in  
2                   person.

3                   As to the private factor, the witnesses are really  
4                   the only private factor that has been raised, and that factor  
5                   definitely favors keeping the case in the Eastern District of  
6                   Virginia, where the defendants are and where they are able to  
7                   participate in person. The defendants haven't raised any of  
8                   the other private factors. So that factor (indiscernible)  
9                   maintaining the case in the Eastern District of Virginia.

10                  As to the public factors, the defendants have raised  
11                  the views of the United Kingdom. The United Kingdom strongly  
12                  supports the suit going forward in the Eastern District of  
13                  Virginia. We have put in a letter from the Foreign Secretary  
14                  of the United Kingdom that states -- I quote Exhibit 6 -- it  
15                  says, "The British government takes the view that citizens  
16                  can bring their case in whichever court they think  
17                  appropriate" -- here, in the Eastern District of Virginia --  
18                  "and the British government has confidence in the ability of  
19                  this Court to hear the case and that the Foreign Secretary  
20                  hopes that the action will be able to proceed here." The  
21                  United Kingdom's interest is in the case proceeding in the  
22                  Eastern District of Virginia.

23                  THE COURT: Why wouldn't the United Kingdom's  
24                  interest first and foremost be to pursue it in the United  
25                  Kingdom with the presence of Ms. Sacoolas if she waives her

1      immunity from civil liability?

2 MS. FRYSZMAN: Ms. Sacoolas, in their papers, they  
3 have said that she refuses to return and will not return.

4 THE COURT: I understand that. But what I'm saying  
5 is why isn't it in the best interests of the United Kingdom  
6 to hear this matter in the United Kingdom, provided  
7 Ms. Sacoolas agrees to come back? I understand she hasn't  
8 agreed to come back. But I assume you and your clients would  
9 prefer to have this case in the United Kingdom if  
10 Ms. Sacoolas and her husband were to return and waive their  
11 immunity. Isn't that right?

12 MS. FRYSZMAN: I would need to check with our  
13 clients, but it is my understanding that she vehemently  
14 opposes returning; that the British government, as recently  
15 as this weekend, asked the Biden Administration to review the  
16 decision not to extradite, and they were refused. So I think  
17 that is just not in the cards, Your Honor. They have said in  
18 their papers that they won't return, and the United States  
19 government has said that they won't review the decision not  
20 to extradite.

24 MS. FRYSZMAN: That is my understanding, that they're  
25 not going to go back and re-review it.

1                   THE COURT: All right. I just wanted that clarified;  
2 that the Biden Administration agrees with the Trump  
3 Administration on this point.

4                   Go ahead.

5                   MS. FRYSZMAN: I think what they said was they  
6 wouldn't re-review it, so the decision is going to just stand  
7 as it was.

8                   But as to the other witnesses that defendant has  
9 mentioned, we have put in affidavits from the other  
10 witnesses, and they're all willing to come to the Eastern  
11 District of Virginia live and in person. So this isn't a  
12 case where -- you know, the defendants have put forth no  
13 information and no evidence that any witness is refusing to  
14 come here. So all the witnesses that we know about are  
15 willing to come here live and in person in the Eastern  
16 District of Virginia, and the opposite is true of the United  
17 Kingdom.

18                   And as to the conflict of laws, I guess I agree with  
19 the defendants, it's going to be British law. We share a  
20 common legal tradition. Everybody agrees that the Court is  
21 well equipped and capable of applying British law. It's in  
22 English, it is a lot like our law. And that Virginia also  
23 has a local interest in the DiFederico case. Again, the  
24 Fourth Circuit says local courts have an interest in the  
25 conduct of their own citizens, particularly diplomats who are

1 representing the United States overseas (indiscernible)  
2 citizens may wish to sue someone in the United Kingdom, and  
3 we would want their courts to be receptive to our own  
4 citizens.

5 THE COURT: All right. I'm going to recess this  
6 matter briefly while I consider whether I have any questions  
7 for you on the *forum non conveniens* issue, and so I will  
8 leave the hearing at this time, recess it.

9 Tanya, you can shift me to the breakout room.

10 THE DEPUTY CLERK: Yes, Judge.

11 MR. McGAVIN: Judge Ellis, I'm sorry to interrupt. I  
12 do have some more information, checking my notes, that could  
13 answer in a bit more detail a couple of your questions if you  
14 would permit me.

15 THE COURT: Yes, of course, you go ahead.

16 MR. McGAVIN: Thank you, sir.

17 I have clarified with one of my colleagues who is  
18 assisting Ms. Sacoolas that Ms. Sacoolas was employed by the  
19 State Department and that the State Department asserted  
20 diplomatic immunity and re-called her. So that was a factor  
21 in her leaving. I wanted to answer that question more  
22 directly.

23 Secondly, Your Honor, I do want to confirm, in  
24 checking my notes, that Ms. Sacoolas, immediately after the  
25 accident, did go to Mr. Dunn. And as she realized he was in

1 distress, a motorist came by, she flagged that motorist down,  
2 and then made the call. She did not leave until the UK  
3 police released her. So she stayed until release by the  
4 police. So those --

12 THE COURT: Who re-called her?

13 MR. McGAVIN: The State Department.

14 THE COURT: Did she work for the State Department or  
15 some other agency?

16 MR. McGAVIN: My understanding from my colleague, in  
17 checking these notes, Your Honor, is that she worked for the  
18 State Department, and that is also from information that she  
19 has provided.

20 THE COURT: So you're telling me that she was a State  
21 Department employee, and that's not a cover job or anything  
22 like that?

23 MR. McGAVIN: I don't know that, and I do not want to  
24 mislead the Court in any way on that. I would have to find  
25 out, to answer that correctly.

1                   THE COURT: But she's not, as I understand it, a  
2 foreign service officer.

3                   MR. McGAVIN: She is waiving diplomatic immunity,  
4 Your Honor, as evidenced by her affidavit.

5                   THE COURT: She is waiving her diplomatic immunity?

6                   MR. McGAVIN: Yes. That's in her affidavit.

7                   THE COURT: And so if she went back -- what she is  
8 not waiving is her immunity from civil and criminal  
9 prosecution in the United Kingdom; is that right?

10                  MR. McGAVIN: Not civil, Your Honor. As I take what  
11 you mean, the consequences of a civil proceeding, meaning  
12 that this lawsuit, she is not -- she is -- she is consenting  
13 to service and accepting service of a civil action in the UK.  
14 But she is not returning for purposes of the criminal  
15 proceedings, no.

16                  THE COURT: All right. Anything else you want to  
17 tell me, Mr. McGavin?

18                  MR. McGAVIN: No. Thank you, Your Honor. Thank you  
19 for allowing me to provide that additional information.

20                  THE COURT: I may have additional questions.

21                  Remove me to the breakout session, Tanya.

22                  THE DEPUTY CLERK: Yes, Judge.

23                  (Recess taken)

24                  THE COURT: All right. I have a few more questions,  
25 if I may.

1                   Mr. McGavin, I've looked a little more carefully.

2                   Your statement that she remained in the UK for 30 days is off  
3                   by a factor of about 2. I think it is 18 days, from what I  
4                   can tell, and it may be sooner. I don't know.

5                   MR. McGAVIN: I'm sorry, Your Honor. This is John  
6                   McGavin. I have checked on that, and I'm corrected. I'm  
7                   told it was about 3 weeks. I wanted to fact check myself  
8                   during our recess, and that's the information that I have.

9                   THE COURT: 18 days.

10                  MR. McGAVIN: It could be 18. I was -- I thought it  
11                  was a bit more, as much as 3 weeks, but I'm not going to  
12                  argue that point, Your Honor.

13                  THE COURT: All right. And let me ask, also,  
14                  Mr. McGavin: I have an understanding -- imperfect, to be  
15                  sure -- that Ms. Sacoolas and one of the children was in the  
16                  car that struck the decedent. Mr. Sacoolas and the other  
17                  child were in another automobile somewhere up ahead. Is that  
18                  your understanding?

19                  MR. McGAVIN: I did not understand that to be true,  
20                  but I don't know, and I don't want to misstate that record.  
21                  She definitely had one of --

22                  THE COURT: You could --

23                  MR. McGAVIN: I'm sorry?

24                  THE COURT: -- how far ahead Mr. Sacoolas was of  
25                  Ms. Sacoolas and whether he stopped for the accident?

1 MR. McGAVIN: I do not believe that Mr. Sacoolas was  
2 at the scene of the accident, Your Honor. What I  
3 understand --

4 THE COURT: I'm saying you couldn't tell me how far  
5 ahead he was, if he was ahead, and whether he stopped; all  
6 you can tell me is your information is he wasn't at any time  
7 at the scene?

8 MR. McGAVIN: That's correct, Your Honor.

11 MS. FRYSZMAN: I do not, Your Honor. I only have  
12 what we've pled in the complaint.

17 MS. FRYSZMAN: I read a wide range of newspaper  
18 stories, and I just -- I don't know what the facts actually  
19 are, Your Honor.

20 THE COURT: All right. Back to the  
21 *forum non conveniens* issue for just a moment. I understand  
22 that she concedes that she was negligent. Of course, if the  
23 matter remains here, she would be deposed, and I take it she  
24 could be deposed here even if the matter were sent back to  
25 the United Kingdom; isn't that right?

1 MR. McGAVIN: This is John McGavin, Your Honor. I  
2 think that is right.

3 MS. FRYSZMAN: I believe that's right, but if there  
4 were to be a trial, the plaintiffs, of course, would like to  
5 put her on live, as we would want all the witnesses to be  
6 live.

7                   THE COURT: Well, of course, you can issue a subpoena  
8 if it's here and she will appear live.

9 MS. FRYSZMAN: Yes.

10 THE COURT: Let's see, I had another question.

11 I understand, Mr. McGavin, you argued that all of  
12 those witnesses who were at the scene of the accident and  
13 could testify about the pain and suffering that the decedent  
14 suffered following the accident, that they're all in England.  
15 What do you say to the fact that it appears that those  
16 witnesses have been identified and have all declared their  
17 willingness to travel to the United States for this case?

1 and upset and felt terrible, and the motorist is the one who  
2 made the call. That motorist is a very important witness to  
3 dispel some of these statements that are made, and I do not  
4 have her name, and she is not -- I know that she is not  
5 listed in the affidavits that have been submitted by the  
6 plaintiffs, Your Honor. That is a very important witness to  
7 dispel --

8 THE COURT: Well, if you don't know her name, how do  
9 you know it isn't one of the witnesses that are in the  
10 affidavits?

11 MR. McGAVIN: Because it is a female, Your Honor,  
12 it's a layperson, and what they have identified is an EMT,  
13 along with the family. So this is a lay witness female.

14 THE COURT: What's her name?

15 MR. McGAVIN: I don't know her name, Your Honor.

16 THE COURT: Did you ask Mrs. Sacoolas?

17 MR. McGAVIN: In my information from Ms. Sacoolas, I  
18 have not secured her name or I don't have her name.

19 THE COURT: Well, you just told me about a witness  
20 you think would be very favorable to your side, but you can't  
21 tell me the name of that witness. Does that strike you as  
22 odd?

23 MR. McGAVIN: I think it is something that I should  
24 know and, unfortunately, I do not. I hope it's not odd, but  
25 I wish I was able to quote that to you, Your Honor.

1                   THE COURT: Well, it is odd. You told me there's a  
2 witness who can dispute some of the things that the plaintiff  
3 is alleging, but you can't tell me who that witness is. So  
4 what you're saying is that is an important witness and the  
5 plaintiff has not shown that that witness would come to the  
6 United States.

7                   MR. McGAVIN: Yes.

8                   THE COURT: So I don't even know if that witness  
9 would be available in England if no one knows that witness'  
10 name.

11                  MR. McGAVIN: Ms. Sacoolas does not know her name.  
12 In looking at my notes, I see that she does not know the name  
13 of it, and it is not in the information that I have obtained  
14 from her.

15                  THE COURT: Well, then, how in the world does that  
16 matter here if nobody knows her name? She won't appear in  
17 England, either.

18                  MR. McGAVIN: I understand that it is in and part of  
19 the police investigation of this matter.

20                  THE COURT: All right. So when the police find out  
21 the identity of this person, then we can ascertain whether  
22 that person would be willing to come to the United States if  
23 the case remains here.

24                  MR. McGAVIN: That's correct, obviously, yes.

25                  THE COURT: All right. You indicated, also, I think,

1 Ms. Fryszman, that the UK has indicated support for plaintiff  
2 bringing the case in the United States. You don't mean to  
3 suggest that the UK is opposed to having the matter fully  
4 litigated in the United Kingdom, with all of the interested  
5 parties there, including the defendants?

6 MS. FRYSZMAN: No, I'm saying that the private  
7 factors, one of which is the interest of the locality, all  
8 favor the Eastern District of Virginia. And the defendants  
9 cannot --

10 THE COURT: That's a public factor.

11 MS. FRYSZMAN: Sorry. I misspoke, Your Honor. It's  
12 a public factor, yes. The defendants can't show that the  
13 public strongly favors transfer because the United Kingdom  
14 has indicated that they support maintaining the suit here in  
15 the Eastern District. So all of the other factors favor the  
16 Eastern District of Virginia, and they would have to strongly  
17 favor the United Kingdom in order for transfer to be  
18 appropriate.

19 If I might add, as to the anonymous and missing  
20 witness, the caselaw is a hundred percent clear that the  
21 defendants would have to come forward with evidence of a  
22 witness as noncumulative testimony and an affidavit saying  
23 that he or she would not come here. They haven't done that.  
24 They have not met their burden on that mystery witness.

25 THE COURT: All right. And the argument about the

1 application of American law -- or English law, rather -- not  
2 American law -- let me be clear about that -- it is not  
3 surprising or unusual for a Federal Court in Virginia to  
4 interpret the law of other states which may be different from  
5 the law of Virginia, as the law of the United Kingdom is from  
6 Virginia law. And that's not a problem. That's what judges  
7 do. And then they fashion appropriate applicable  
8 instructions. Now, the jury is unfamiliar with both American  
9 and English law, so I don't know that it makes any difference  
10 there.

11 Mr. McGavin, tell me why you think the application of  
12 English law militates in favor of a dismissal on  
13 *forum non conveniens* grounds given what I just said.

14 MR. McGAVIN: I have no doubt, Your Honor, that you  
15 can interpret and read the materials and understand the law.  
16 But it is so summarily different in terms of how it is  
17 interpreted in the UK. For example, Your Honor, in the  
18 United States, insurance companies issue policies of  
19 insurance that have limits, \$50,000, \$100,000 policies. The  
20 insurance policies in the UK, that is a foreign concept for  
21 them. They don't have limits, and part of that is because of  
22 how these tragedies are interpreted under their law and how  
23 they narrowly construe bereavement laws and solace and these  
24 issues of what's a dependency or a pecuniary loss. So it is  
25 quite narrow and quite restricted. And it is a very

1 different application, which although --

2 THE COURT: Isn't that what you say I'm competent to  
3 understand and to instruct the jury on?

4 MR. McGAVIN: To a point, Your Honor. It's one thing  
5 for the scholars to read the law; it's another to actually,  
6 as I say in the world of trial work, make the sausage, so to  
7 speak, to actually see how it is applied. And it is a little  
8 different. And that's why I think that the expert statements  
9 that we've submitted from Mr. Palmer, which outline the very  
10 limited interpretations that are applicable under UK law, are  
11 very foreign to us in a wrongful death action where we have  
12 the concepts of bereavement and solace and loss of kindly  
13 offices, those elements that are unique to at least Virginia  
14 statutory scheme for wrongful death awards.

15 THE COURT: What is it you think I can't understand  
16 as a judge about that?

17 MR. McGAVIN: I think what will be hard for the Court  
18 is to understand just how restrictive the awards are and how  
19 narrow their interpretations of the --

20 THE COURT: Well, I might not agree with it, but that  
21 doesn't mean I can't understand it and apply it. Whether I  
22 agree with English law or not is totally irrelevant,  
23 completely irrelevant. Any reason why you think I can't  
24 understand it and apply it?

25 MR. McGAVIN: Well, I know you can understand it.

1                   THE COURT: Of course I can. It's in English; isn't  
2 it? And the opinions are in English.

3                   MR. McGAVIN: They are in the King's English, yes,  
4 Your Honor.

5                   THE COURT: All right. And actually I have some  
6 experience in legal education in England. Of course, any  
7 American judge can understand it and apply it, and the jury  
8 doesn't know any different, whether they would be in England  
9 or the United States. They have to listen to what a judge  
10 says and apply it. I'm not moved much by that, I can tell  
11 you that. I think that yes, it's unfamiliar, but it's in  
12 English, the cases are in English. I can understand it, and  
13 I'm bound by it, and I will apply it in instructions. But I  
14 don't think it's an important factor. I think it is  
15 appropriate for you to raise it as a factor, but I don't  
16 think it is a decisive one. The private factors I think you  
17 all have told me about.

18                   Is there anything more about the private factors that  
19 you want to add, Mr. McGavin? And then I will ask you,  
20 Ms. Fryszman.

21                   MR. McGAVIN: Yes, Your Honor. The police  
22 investigation, which will include the name of this witness,  
23 who, as I get information from one of my colleagues by  
24 e-mail, is Jennifer Hewett (phonetic), is this witness' name,  
25 but I don't have an address or contact information for her.

1           But that police investigation, that information will be  
2           important to us, and that of course will be something that is  
3           subject to far easier a subpoena in the UK and obtaining that  
4           information in the UK than it will be in the U.S. So I would  
5           add that additional information in trying to give the Court  
6           full answers to the questions that you've asked.

7           THE COURT: You really think so? Do you know about  
8           depositions in the United Kingdom, Mr. McGavin?

9           MR. McGAVIN: No, Your Honor. I'm not a -- I'm not  
10           a -- I'm not.

11           THE COURT: I'm an old man, Mr. McGavin, and I go  
12           back a long ways. Many years ago, before I was a judge, I  
13           was a lawyer litigating antitrust cases in Europe, including  
14           the United Kingdom. It's totally irrelevant to what's before  
15           me today. But I tried to take the deposition of people in  
16           France and Switzerland, and I almost got put in jail for  
17           trying that. Taking depositions in Europe is far different  
18           from taking depositions here.

19           But anyway, we shall see. I will consider what you  
20           have said.

21           How about public factors?

22           Well, let me ask Ms. Fryszman, do you have anything  
23           more on private factors?

24           MS. FRYSZMAN: Only that they have only raised the  
25           issue of witnesses, they have not raised any of the other

1           private factors. As to this witness, no one has put in  
2           anything before Your Honor to indicates that this witness  
3           wouldn't be willing to come here and wouldn't be willing to  
4           (indiscernible).

5           THE COURT: Well, perhaps you now have the name of  
6           that witness. I don't know what other information you're  
7           getting by e-mail, Mr. McGavin. If you have more that you  
8           want to tell me, by all means do so, or else the person who  
9           is giving you that information can produce himself or  
10           herself, and I will hear from them if they're counsel for the  
11           defendants.

12           But you have the name of that person, Ms. Fryszman,  
13           and now you can pursue that.

14           Now, let's go to the private factors. Mr. McGavin,  
15           do you have anything more to tell me about the private  
16           factors?

17           MR. McGAVIN: I'm checking my notes, Your Honor.  
18           Thank you.

19           I think I have discussed the local interest, which I  
20           think is quite strong, obviously, in the UK as evidence by  
21           the attachments that have been submitted on behalf of the  
22           plaintiff. There seems to be an extraordinary local interest  
23           in having this matter litigated and decided. And the  
24           attachment from -- or the letter suggesting there is no  
25           opposition to this going forward in the U.S. is not quite the

1 same as saying that the British government has endorsed this  
2 case being taken by this Court to be decided. I think they  
3 defer, Your Honor, to your sound judgment.

4 As to court congestion, obviously the Eastern  
5 District of Virginia will move expeditiously. That's not an  
6 issue. But we also understand that, in the UK, because of  
7 their procedures where they go into ADR, as this is a  
8 damages-only case, it is our understanding from Mr. Palmer,  
9 who provided our expert report, that would move  
10 expeditiously. So there is no difference so much there.

11 And I mentioned, of course, the Court not being  
12 completely at home with this law. No other public interest  
13 issues I can -- I believe that are applicable or will impact  
14 on the Court's decision other than those I have already  
15 cited.

16 Thank you.

17 THE COURT: Refresh my recollection, if you would,  
18 please. Is Mr. Palmer a barrister, solicitor, or academic?

19 MR. McGAVIN: All right. I believe he is a  
20 barrister. I'm checking. I believe that's right. I think  
21 he is not only -- yes, he is a barrister of the English Bar  
22 and Queen's Counsel, called to the bar in 1977.

23 THE COURT: All right. Thank you. All right.

24 Anything more on public factors, Ms. Fryszman?

25 MS. FRYSZMAN: Yes, Your Honor. I just wanted to

1 reiterate that the closing line of the letter from the  
2 British Foreign Secretary is, "I hope, therefore, your action  
3 in the United States is able to proceed." It's not quite as  
4 neutral as Mr. McGavin would have you believe. It is clearly  
5 a statement of support for the parents and for the action to  
6 proceed in the Eastern District of Virginia (indiscernible).

7 As to the barrister, one of the issues that the  
8 barrister -- the defendant's expert did not address at all --

9 THE COURT: I'm sorry. Say that again. I can't hear  
10 you, Ms. Fryszman.

11 MS. FRYSZMAN: One of the issues that the barrister  
12 for the defendants did not address at all is whether the case  
13 can, in fact, go forward remotely. Our expert, who is also a  
14 barrister, said that British courts don't go forward  
15 remotely, and the defendants would need to be present. And  
16 as you know, the defendants are refusing to return to the  
17 United Kingdom for trial or for any proceedings. And it is  
18 the view of our barrister that the court wouldn't proceed in  
19 that manner. So the defendants haven't, in fact, shown that  
20 it is an available or adequate forum because they didn't put  
21 in any evidence that the Court could, in fact, proceed if the  
22 defendants don't turn up in the United Kingdom.

23 THE COURT: All right. I'm going to go into a  
24 breakout session one last time, and then I will return and  
25 tell you how I intend to proceed.

1                   Tanya, could you remove me to a breakout session,  
2                   please.

3                   THE DEPUTY CLERK: Yes, Judge.

4                   (Recess taken)

5                   THE COURT: All right. Ms. Fryszman, Mr. McGavin,  
6                   thank you for your arguments. They were helpful, and your  
7                   briefs, as well, and I will review them thoroughly. I'm  
8                   going to decide this issue promptly and not go on today to  
9                   the other issues, but I will schedule a hearing for the other  
10                  issues on the possibility that I will deny the motion for  
11                  *forum non conveniens*, and then I will hear these matters.  
12                  But I'm going to decide the motion to dismiss on  
13                  *forum non conveniens* grounds first, and then I will proceed  
14                  on February the 17th, at 3 p.m., in the event that I deny the  
15                  motion to dismiss on *forum non conveniens* grounds, and on  
16                  that date, I will hear argument on the remaining issues on  
17                  the motion to dismiss.

18                  All right. I thank counsel again for your arguments.

19                  I will point out one thing. I think it was  
20                  Mr. McGavin who said this. Mr. McGavin, you said something  
21                  about the King's English. You're wrong. It is the Queen's  
22                  English.

23                  MR. McGAVIN: Your Honor, I'm wondering if during  
24                  your service in the -- I think it was the Navy -- if you were  
25                  stationed over there and learned some of that English. I

1 don't know.

2 THE COURT: No, I was stationed on aircraft carriers,  
3 not on the ground. But my time in England was as a student  
4 and, later on, in a sabbatical, and so my view is it's the  
5 Queen's English, and long may she reign.

6 MR. McGAVIN: Well, thank you, Your Honor. If my  
7 wife, who is quite a lover of the PBS British shows, hears  
8 that I made that mistake, I'm sure she will equally point out  
9 to me that I was incorrect.

10 THE COURT: All right. I thank counsel for your  
11 cooperation and your arguments. They were, indeed, helpful.

12 It is an important issue. All issues are important  
13 to the parties that are making them, and I remind myself  
14 every time of that, and I will give it careful consideration  
15 and issue a decision in advance of the February date that I  
16 have set for further arguments. And at that time, depending  
17 on the decision I make on the *forum non conveniens* motion,  
18 that further argument will need to be canceled or will  
19 proceed.

20 Any questions, Ms. Fryszman?

21 MS. FRYSZMAN: No, Your Honor.

22 THE COURT: Mr. McGavin?

23 MR. McGAVIN: Just confirming the date, Your Honor.  
24 I was trying to write it down quickly. Did you say  
25 February 17, at 3 p.m.?

1 THE COURT: Yes, sir.

2 MR. McGAVIN: Thank you. Nothing else. Thank you,  
3 Your Honor.

4 THE COURT: I thank counsel again. The court stands  
5 in recess.

6 (Proceedings adjourned at 4:11 p.m.)

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1 CERTIFICATE OF OFFICIAL COURT REPORTER

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/s/ Patricia A. Kaneshiro-Miller

February 5, 2021

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PATRICIA A. KANESHIRO-MILLER

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